No. 80-1686

MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL.,
(Adams Extract Co., *et al.* real parties in interest),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER THE MEAD CORPORATION IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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In its opposition, respondents assert in direct reference to this Court's Rule 17 that:

> Petitioner Mead has shown . . . [1] no conflict with the decisions of this Court, [2] no important question of federal law that this Court has not previously decided, and certainly [3] no unusual

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, Mead refers to the list of subsidiaries and affiliates contained in its previously filed Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

departure from the normal course of judicial proceedings. Opposition at 16.

The opposition is wrong on each count.

(1) The Decision Below Is Squarely in Conflict with *Hodges* v. *Easton*, 106 U.S. 408 (1882)

The decision below is flatly contrary to this Court's decision in *Hodges* v. *Easton*, 106 U.S. 408 (1882). There, the trial court submitted only a part of the issues in a single cause of action to the jury, "itself determining the remainder" on the theory that the remaining facts were "conceded or not disputed." This Court held that, where the Seventh Amendment applies, *all* facts must be submitted to the jury albeit pursuant to a "peremptory instruction" where appropriate, and consequently ordered a new trial. *This Court then specifically rejected the claim that the new trial should only cover the issues withheld from the first jury.*

In ordering a retrial on *all* issues, the Court in *Hodges* took particular note of the cases in which a full jury trial was held, followed by partial reversal on appeal, and in which a retrial was limited to those issues not properly tried in the first place. It expressly *reserved judgment* on whether these cases were "sound or not." Since, in *Hodges*, as in this case, there had never been a full jury trial in the first place, the Court ordered a full jury trial on all issues on remand. *See Hodges* v. *Easton*, 106 U.S. at 412-13 (last paragraph). Unless *Hodges* has been overruled by *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), it precludes splitting a jury trial into two trials before two fact-finders. Although lower courts are in confusion on the point, *Gasoline Products Co.*, as set forth below, decided only the question left open in *Hodges*, *i.e.*, whether after a *full* jury trial in the first instance, a retrial following reversal on appeal could be limited only to those issues infected by error below.

(2) This Case Poses an Important Issue of Seventh Amendment Law Which the Lower Courts View as Unresolved

Mead's petition raises an important question of federal law that the lower courts view as unresolved. That issue is whether, after *Gasoline Products Co.*, district courts have discretion to split a single cause of action into two trials before different juries or whether the constitutional right to jury trial still includes the right to have the whole case—*i.e.*, all issues in a single cause of action—presented to a single jury. The Fifth Circuit Court of Appeals just recently addressed this same issue, stating:

> There is a still unanswered question whether the seventh amendment right to a jury trial permits the separate phases of a trial to be submitted to different juries. . . . It was wise for the trial judge to avoid the constitutional problem if he could properly do so.

Dunn v. *Sears, Roebuck & Co.*, 639 F.2d 1171, 1174 (5th Cir. 1981) (citations omitted).

In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), a full trial on all issues was had to a jury. On appeal, the court found error on the damage issue only and remanded for a new trial. The issue then presented to this Court was the issue which had been left open in *Hodges* v. *Easton*—namely, whether the new trial should be on all issues or just on the issue infected with error. This Court said that the case once having been fully submitted to a single jury, might in some circumstances be retried only on the issue infected with error. *Gasoline Products Co.*, however, did not expressly, or otherwise, purport to overrule *Hodges*. Many lower courts have erroneously assumed that it did and others have expressed confusion on this issue, particularly in recent opinions in antitrust class action litiga-

tions. This is an issue of paramount importance which only this Court can resolve.

(3) The Proceedings Below Involve an Unusual Departure from the Normal Course of Judicial Proceedings

This case involves a departure from the normal course of judicial proceedings never before countenanced in the history of American jurisprudence. Here, the district court judge bifurcated the case only *after* the end of the jury trial.

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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